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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-220

NELLIE POPE, ADMINISTRATRIX
PETITIONER,

v.

MOORE-MCCORMACK LINES, INC.
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF MASSACHUSETTS COUNTY OF SUFFOLK

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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MOORE-MCCORMACK LINES, INC.
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF MASSACHUSETTS COUNTY OF SUFFOLK

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Nellie Pope, Administratrix of the Estate of Rudolph Campbell, respectfully prays that a writ of certiorari issue to the Superior Court of the Commonwealth of Massachusetts, County of Suffolk, to review the judgment of that Court entered on the 17th day of May 1971, pursuant to rescript entered by the Supreme Judicial Court of the Commonwealth of Massachusetts on the 4th day of May, 1971. The said judgment has been docketed, and a copy of that docket entry is appended here-

to and marked Appendix A. The rescript of the Supreme Judicial Court of the Commonwealth of Massachusetts overruling petitioner's exceptions is in the official record of the Superior Court of the Commonwealth of Massachusetts, County of Suffolk, a copy of which is appended hereto and marked Appendix B.

I.
Opinion Below

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts does not yet appear in the official reporter. It is contained in the official record of the Superior Court of the Commonwealth of Massachusetts, County of Suffolk, a copy of which is appended hereto and marked Appendix C. It also appears in volume 269 of the second series of the Northeast Reporter at page 706.

II.
Jurisdiction

The judgment of the Superior Court of the Commonwealth of Massachusetts, County of Suffolk, now sought to be reviewed was entered on the 17th day of May, 1971. Entry was pursuant to a decree rendered by the Supreme Judicial Court of the Commonwealth of Massachusetts on the 4th day of May, 1971. There were no rehearings or motions. Therefore, this petition falls within the time prescriptions of Title 28 of the United States Code, Section 2101.

Jurisdiction to review the aforesaid proceedings exists by virtue of Title 28 of the United States Code, Section 1257.

III.
Question Presented

Where an administratrix prosecutes in a state court derivative and non-derivative causes of action arising out of the wrongful death of a seaman upon the high seas, does the state court possess jurisdiction of a cause of action for wrongful death pleaded under the Death On the High Seas Act §§ 1-7, 46 U.S.C. §§ 761-68 (1964)?

IV.
Statutes Involved

The case involves the following statutes:

Death on the High Seas Act, §§ 1-7, 46 U.S.C. §§ 761-68 (1964) (Relevant portions reproduced in Appendix D and hereinafter cited as DOHSA)
Jones Act § 1, 46 U.S.C. § 688 (1964) (Relevant portions reproduced in Appendix E and hereinafter cited as Jones Act)
28 U.S.C. § 41(3) (1940) (Relevant portions reproduced in Appendix G)
28 U.S.C. § 1333 (1964) (Relevant portions reproduced in Appendix F)
G.L. (Ter.Ed.) c. 212 § 4 (1954) (Reproduced in Appendix H)
M.G.L.A. c. 229 § 1 et seq (1967) (Relevant portions reproduced in Appendix I)

V.
Statement of Facts

On or about the 14th day of September, 1967, the petitioner's intestate sustained injuries aboard the respond-

ent's vessel S.S. Mormacscan while upon the high seas. At the time said injuries were sustained, the petitioner's intestate was a seaman and member of the crew of the S.S. Mormacscan. As a result of said injuries, the petitioner's intestate expired on the 25th day of September, 1967.

VI.
History of Proceedings

On the 21st day of September, 1967, the petitioner brought an action in state court against the respondent for derivative and non-derivative claims arising out of the death of the petitioner's intestate. The trial court was asked in five counts of the petitioner's Declaration to provide the petitioner with monetary relief. Count I alleged a derivative cause of action under the Jones Act for personal injuries sustained as a result of the defendant's negligence. Count II alleged a derivative cause of action under the General Maritime Law for personal injuries sustained as a result of the unseaworthiness of the defendant's vessel. Count III alleged a non-derivative cause of action under the Jones Act for death sustained as a result of the defendant's negligence. Count IV alleged a non-derivative cause of action under the General Maritime Law for burial expenses. Count V alleged a non-derivative cause of action under the DOHSA for death sustained as a result of the negligence of the defendant and the unseaworthiness of the defendant's vessel.

The respondent filed an Answer which both denied all allegations contained in the Declaration and asserted various affirmative defenses. The respondent also filed a Demurrer to Count V on the ground that a state court had no jurisdiction to entertain a cause of action pleaded

under the DOHSA. The trial court sustained the Demurrer and exception was duly taken by the petitioner.

After a hearing of the case, an adverse verdict was rendered on Counts I, II and III. Recovery was allowed on Count IV. The petitioner timely filed its Bill of Exceptions and the Supreme Judicial Court of the Commonwealth of Massachusetts subsequently reviewed said Bill. That Honorable Court affirmed the ruling of the trial court on the Demurrer and held that the courts of the Commonwealth of Massachusetts were without jurisdiction of a cause of action pleaded under the DOHSA.

VII.

Considerations Governing Review On Certiorari

Several state courts have ruled on the question at bar but this Honorable Court has not.

Decisions of state courts finding state and federal court concurrent jurisdiction:

Bugden v. *Trawler Cambridge,* 319 Mass. 315, 65 N.E.2d 533 (1946); *Ledet* v. *United States Aircraft Corp.,* 10 N.Y.2d 258, 176 N.E.2d 820 (1961); *Wyman* v. *Pan-American Airways, Inc.,* 181 Misc. 963, 43 N.Y.S.2d 420, aff'd 267 App. Div. 947, 48 N.Y.S.2d 459, motion for leave to appeal denied 267 App. Div. 983, 49 N.Y.S.2d 271, cert. denied 324 U.S. 882 (1943); *Choy* v. *Pan-American Airways Co.,* 1941 A.M.C. 912 (N.Y. Sup. Ct. 1941), aff'd 262 App. Div. 995, 30 N.Y.S.2d 816 (1941); *Kirstanson* v. *Steinfeldt,* 256 App. Div. 824, 9 N.Y.S.2d 790 (1939); *Colbert* v. *Steinfeldt,* 255 App. Div. 790, 7 N.Y.S.2d 373 (1938); *Elliot* v. *Steinfeldt,* 254 App. Div. 739, 4 N.Y.2d 9 (1938);

Murphy v. *Steinfeldt*, 254 App. Div. 741, 4 N.Y.S. 2d 10 (1938).

Decisions of state courts finding exclusive federal court jurisdiction:

Gordon v. *Reynolds*, 187 Cal. App. 2d 472, 10 Cal. Rptr. 73 (1960), hearing denied by Sup. Ct. (1961); *Boudreau* v. *Boat Andrea G. Corporation*, 350 Mass. 473, 215 N.E.2d 907 (1966).

Decisions of the Supreme Court of the United States refusing to consider question:

Hess v. *United States*, 361 U.S. 314, 320 (1960).

Several state courts have ruled on the question at bar in a manner not in accord with applicable decisions of this Honorable Court.

Decisions of state courts finding exclusive federal court jurisdiction:

Gordon v. *Reynolds*, supra.; *Boudreau* v. *Boat Andrea G. Corporation*, supra.

Decisions of the Supreme Court of the United States suggesting the existence of concurrent state and federal court jurisdiction:

Moragne v. *States Marine Lines, Inc.*, 398 U.S. 375, 401 fn. 14 (1970); *Gillespie* v. *United States Steel Corporation*, 379 U.S. 148, 165 (1964); *Goett* v. *Union Carbide Corporation*, 361 U.S. 340, 345-47 (1960) (Mr. Justice Whittaker's dissent); *Romero* v. *International Term. Operating Co.*, 358 U.S. 354, 373 (1959); *The M/V "Tungus"* v.

Skovgaard, 358 U.S. 588, 600-9 (1959) (Mr. Justice Brennan's dissent with whom Mr. Chief Justice Warren, Mr. Justice Black and Mr. Justice Douglas join, concurring in part and dissenting in part).

Many lower United States Courts have ruled on the question at bar and used various contradicting theories in support of said rulings.

Compare, Dore v. *Link Belt Company,* 391 F.2d 671 (5th Cir. 1968), rev'd on other grounds by *Rodrique* v. *Aetna Casualty and Surety Company,* 395 U.S. 352 (1969); *Berry* v. *Pacific Sportfishing, Inc.,* 372 F.2d 213 (9th Cir.), cert. denied, 389 U.S. 821 (1967); *Blumenthal* v. *United States,* 189 F. Supp. 439 (E.D.Pa. 1960), aff'd 306 F.2d 16 (3rd Cir. 1962); *Trihey* v. *Transocean Air Lines, Inc.,* 255 F.2d 824 (9th Cir.), cert. denied, 358 U.S. 838 (1958); *Turner* v. *Wilson Line of Massachusetts,* 142 F. Supp. 264 (Mass. 1956), aff'd, 242 F.2d 414 (1st Cir., 1957); *Middleton* v. *Luckenback, S.S. Co.,* 70 F.2d 326 (2nd Cir.), cert. denied, 293 U.S. 577 (1934); *Canillas* v. *Joseph H. Cortes, Inc.,* 280 F. Supp. 48 (S.D.N.Y. 1968); *Scott* v. *Middle East Airlines Co., S.A.,* 240 F. Supp. 1 (S.D.N.Y. 1965); *Cunningham* v. *Bethlehem Steel Co.,* 231 F. Supp. 934 (S.D.N.Y. 1964); *Grigsby* v. *Coastal Marine Service of Texas, Inc.,* 235 F. Supp. 97 (W.D. La. 1964); *Jennings* v. *Goodyear Aircraft Corporation,* 227 F. Supp. 246 (Del. 1964); *Pardonnet* v. *Flying Tiger Line, Inc.,* 233 F. Supp. 683 (N.D. Ill. 1964); *Devlin* v. *Flying Tiger Lines, Inc.,* 220 F. Supp. 924 (S.D.N.Y. 1963); *Williams* v. *Moran, Proctor, Mueser & Rutledge,* 205 F.

Supp. 208 (S.D.N.Y. 1962); *Kunkel* v. *United States,* 140 F. Supp. 591 (S.D.Cal. 1956); *Higa* v. *Transocean Airlines,* 124 F. Supp. 13 (Hawaii 1954), aff'd 230 F.2d 780 (9th Cir. 1955), dismissed 352 U.S. 802 (1956); *Wilson* v. *Transocean Airlines,* 121 F. Supp. 85 (N.D. Cal. 1954); *Montgomery* v. *Goodyear Tire & Rubber Co.,* 231 F. Supp. 447 (S.D.N.Y. 1964); *Abbott* v. *United States,* 207 F. Supp. 468 (S.D.N.Y. 1962); *with, Safir* v. *Compagnie Generale Transatlantique,* 241 F. Supp. 501 (E.D.N.Y. 1965); *Sierra* v. *Pan-American World Airways,* 107 F. Supp. 519 (P.R. 1952); *Batkiewicz* v. *Seas Shipping Co., Inc.,* 53 F. Supp. 802 (S.D.N.Y. 1943); *Powers* v. *Cunard S.S. Co., Ltd.,* 32 F.2d 720 (S.D.N.Y. 1925).

The question at bar is important and deserving of treatment by this Honorable Court.

The Federal Courts are overcrowded and threatened with an inability to handle significant issues in a thorough manner. A finding of concurrent state and federal court jurisdiction would permit a lessening of the case load burden on lower federal courts.

Exclusive jurisdiction in federal courts also results in multiplicity of actions. An administrator of an estate may be able to prosecute most non-derivative claims and all derivative claims in a state court but be compelled to bring non-derivative claims under the DOHSA in United States District Court.

See generally American Law Institute, Study of the Division of Jurisdiction between State and Federal Courts, Section 1316 and Commentary pp. 34-35, 236-37, (1969); Forde, Concurrent Jur-

isdiction of State and Federal Courts in Actions Under the Federal Death on the High Seas Act, 13 Trial Lawyers Guide 61 (1969).

This Honorable Court's most recent decision concerning wrongful death in admiralty has cast grave doubt upon the continuing vitality of time honored precedent. There is significant language in the opinion of *Moragne* v. *States Marine Lines, Inc.* supra, indicating the existence of state and federal court concurrent jurisdiction; this language is in derogation of many prior lower federal court opinions.

> *Compare, Moragne* v. *States Marine Lines, Inc.*, supra at 401 fn. 14; *with, e.g., Dore* v. *Link Belt Company,* supra; *Berry* v. *Pacific Sportfishing, Inc.,* supra; *Turner* v. *Wilson Line of Massachusetts,* supra; *Trihey* v. *Transocean Air Lines. Inc.,* supra; *Middleton* v. *Luckenback S.S. Co.,* supra.

With the advent of the *Moragne* decision, this long unresolved issue would now seem ripe for resolution.

VIII.
Argument

Where an administratrix prosecutes in a state court derivative and non-derivative causes of action arising out of the wrongful death of a seaman upon the high seas, the state court possesses jurisdiction of a cause of action for wrongful death pleaded under the DOHSA.

Section 1 of the DOHSA specifies that the personal representative of a person who dies as a result of a wrongful act

". . .may maintain a suit for damages in the district courts of the United States, in admiralty. . . ."

46 U.S.C. § 761 (1964)

There is however no language specifically precluding the exercise of jurisdiction by a state court.

Rules of statutory interpretation suggest the existence of state and federal court concurrent jurisdiction of a cause of action pleaded under the DOHSA absent specific exclusionary language in that act.

State courts are customarily granted concurrent jurisdiction with federal courts of federal statutory causes of action where congress has not otherwise provided.

> *Clafin* v. *Houseman,* 93 U.S. 130, 136 (1876); Hamilton, The Federalist, No. 82 (1788).

When a federal statute creates a remedy which is subject to state court jurisdiction, a state court is bound to provide a forum.

> *Testa* v. *Katt,* 330 U.S. 386 (1947).

If the DOHSA cannot be construed as a grant of jurisdiction to state courts of a federal cause of action, the act contains language indicating that state statutes of general jurisdiction are applicable.

> "The provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this chapter." § 7, 46 U.S.C. § 767 (1964).

The language specifically granting jurisdiction to federal district courts in admiralty should not be deemed exclusionary. It has long been held that where a federal sta-

tute creates a remedy and specifically grants jurisdiction of the remedy to federal courts, a state court also has jurisdiction under a state statute of general jurisdiction barring federal statutory language explicitly prohibiting the exercise of state court jurisdiction:

> ". . .jurisdiction is not defeated by implication. And, considering the relation between the Federal and state government, there is no presumption that congress intended to prevent state courts from exercising the general jurisdiction already possessed by them, and under which they had the power to hear and determine causes of action created by Federal Statute."
>
> *Galveston, H. & S.A.R. Co.* v. *Wallace,* 223 U.S. 481 (1912). See also *United States* v. *Bank of New York & Trust Co.,* 296 U.S. 463 (1936).

There are at least two possible reasons for the specific grant of jurisdiction. The first is that the drafters of the DOHSA desired to ensure that at least admiralty courts be given jurisdiction of the cause of action created.

> See generally *Moragne* v. *States Marine Lines, Inc.,* supra at 401 fn. 14.

The second is that the drafters did not wish to compel the state courts to furnish a forum for the federal cause of action.

> See generally *Testa* v. *Katt,* supra.

The Commonwealth of Massachusetts has a statute conferring general jurisdiction to Superior Courts of the Commonwealth.

> G.L. (Ter. Ed.) c. 212 § 4 (1954).

This statute has been held to confer jurisdiction of causes of action sounding in admiralty.

> *Proctor* v. *Dillon*, 235 Mass. 538, 129 N.E. 265 (1920); *Boudreau* v. *Boat Andrea G. Corporation*, supra.

There appears to be no reason why a state statute of general jurisdiction would be inapplicable.

> Cf. *Powers* v. *Cunard S.S. Co., Ltd.*, supra.

In view of the liberalism traditionally encouraged in interpreting statutes in the maritime area, it would seem inappropriate to restrictively interpret the jurisdictional grant to federal courts in the DOHSA as prohibiting state court exercise of concurrent jurisdiction.

> See generally *Gillespie* v. *United States Steel Corporation*, supra at 165.

Furthermore,

> "(D)eath statutes have their roots in dissatisfaction with the archaisms of the law ... it would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied."
>
> *Van Beeck* v. *Sabine Towing Co.*, 300 U.S. 342, 350-51 (1937).

Yet if the DOHSA cannot be construed to confer jurisdiction on a state court or be deemed to permit the state court exercise of jurisdiction over the cause of action by virtue of a state statute of general jurisdiction, it can be argued that remedies and jurisdictional grants are available elsewhere.

The DOHSA has long been recognized as being remedial in nature. The statute does not create a right but rather provides a remedy for the vindication of a pre-existing right.

> *Moragne* v. *States Marine Lines, Inc.*, supra; *Goett* v. *Union Carbide Corporation*, supra at 345-47 (Mr. Justice Whittaker's dissent); *Hess* v. *United States*, supra at 330 (Mr. Justice Frankfurter's dissent); *The M/V "Tungus"* v. *Skovgaard*, supra at 601 (Mr. Justice Brennan's dissent); *Holly* v. *The Mandred Stansfield*, 269 F.2d 317, 320 (9th Cir. 1959); *King* v. *Pan-American World Airways*, 270 F.2d 355 (9th Cir. 1959), cert. denied 362 U.S. 928 (1960).

Pleading a cause of action under the DOHSA would, however, identify a right as well as specify a remedy. In the event that the remedy pleaded was without the jurisdiction of a state court, that state court would still have before it a right. The state court could then search to apply another remedy subject to that court's jurisdiction in order to vindicate the right still before it. A limitation of jurisdiction which is part of a remedial statute could logically be construed to only limit the application of the remedy created by that statute. Other remedies available to vindicate the pre-existing right would remain unrestricted.

> *Safir* v. *Compagnie Generale Transatlantique*, supra; *Ledet* v. *United Aircraft Corporation*, supra.

Utilization of this methodology is encouraged by the "savings to suitors" clause in section 1333 of Title 28 of the United States Code. It has been said of the "savings to suitors" clause that it saved

"... all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved."

> *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 123 (1924); *Cf. Panama R.R.* v. *Vasquey*, 271 U.S. 557 (1926) construing the "savings to suitors" clause as permitting concurrent state and federal court jurisdictions of Jones Act claims.

The "means" have included those remedies available in both state and federal law.

> *Waring* v. *Clarke*, 46 U.S. 441 (1847); *Romero* v. *International Terminal Operating Co.*, supra.

The "means" have both common and statutory law origins.

> See, e.g., former section 41(3) of 28 U.S.C. (1940). See also *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, reh. den'd 328 U.S. 878 (1946).

This methodology of "remedy borrowing" is also consistent with the reservation of state remedies in Section 7 of the DOHSA. If Section 7 has any vitality, it must at least preserve remedies already available in state courts to redress wrongs on the high seas resulting in death.

There are remedies and grants of jurisdiction in state and federal law which permit the vindication in state courts of the right pleaded under the DOHSA.

State wrongful death acts provide remedies and grants of jurisdiction in state courts for the vindication of rights abridged when a wrongful death occurs in admiralty.

State remedies for wrongful death are available whether the death occurs within state territorial waters

Western Fuel Co. v. *Garcia,* 257 U.S. 233 (1921); *Steamboat Co.* v. *Chase,* 83 U.S. 522 (1872).

or without.

The Hamilton, 207 U.S. 398 (1907); *The James McGee,* 300 F. 93 (S.D. N.Y. 1924).

Availability of these remedies is assured because the right identified in the DOHSA is pre-emptive only of substantive rights; it does not pre-empt alternative remedies.

Moragne v. *States Marine Lines, Inc.,* supra; *Knickerbocker Ice Co.* v. *Stewart,* 253 U.S. 149 (1920).

Accordingly, remedies provided in state wrongful death acts have been held sufficient to convey jurisdiction to state courts to vindicate non-derivative federal rights abridged through wrongful death in admiralty.

United States District Courts:

Safir v. *Compagnie Generale Transatlantique,* supra; *Sierra* v. *Pan-American World Airways,* supra; *Powers* v. *Cunard S. S. Co., Ltd.,* supra;

State Courts:

Ledet v. *United Aircraft Corporation,* supra.

These decisions are in consonance with the well recognized means of preserving federal derivative rights through application of state remedies provided in survival statutes.

Romero v. *International Term. Operating Co.,* supra; *Roth* v. *Cox,* 348 U.S. 207 (1954).

The question of whether a state remedy may be so repugnant to maritime law as to be inapplicable in admiralty has been left unresolved by this Honorable Court.

> *Hess* v. *United States,* supra at 320; But see *The Harrisburg,* 119 U.S. 199 (1886).

There is no likelihood that application of a state remedy would prevent federal uniformity or thwart federal preemption of state law in substantive areas.

> See generally *Knickerbocker Ice Co.* v. *Stewart,* 253 U.S. 149 (1920); *Lindgren* v. *United States,* 281 U.S. 38 (1930); *Southern Pacific Co.* v. *Jensen,* 244 U.S. 205 (1917); *Chelentis* v. *Luckenback S. S. Co.,* 247 U.S. 372 (1918); *Pope & Talbot, Inc.* v. *Hawn,* 346 U.S. 406 (1953); *Carlisle Packing Co.* v. *Sandanger,* 259 U.S. 255 (1920); *Hess* v. *United States,* supra at 324-6 (Mr. Justice Frankfurter's dissent).

Federal remedies are also available to permit the vindication in state courts of a right identified in the DOHSA.

This Honorable Court held in *Moragne* v. *States Marine Lines,* supra, that a cause of action for wrongful death in territorial waters existed by virtue of the General Maritime Law. The remedy recognized in that decision is available in both federal and state courts.

> See generally *Chappell* v. *Bradshaw,* 128 U.S. 132 (1888); *Testa* v. *Katt,* supra; *Carlisle Packing Co.* v. *Sandanger,* supra.

It follows that the remedy is available for the vindication of the federal right identified in the DOHSA.

Compare, Safir v. *Compagnie Generale Transatlantique,* supra; *Ledet* v. *United Aircraft Corporation,* supra; with, *Iowa-Des Moines National Bank* v. *Bennett,* 284 U.S. 239 (1931); *McPherson* v. *Steamship South African Pioneer,* 321 F. Supp. 42, 47-8 (E.D.Va. 1971).

In view of the similarity between the rights involved surrounding wrongful death both within and without territorial waters under the General Maritime Law, it may be that the rights recognized in the *Moragne* decision are identical to the rights pleaded under the DOHSA. The similarity of substance between these right determinative bodies of law diminishes the efficacy of criticism concerning "remedy borrowing."

See generally Hart & Wechsler, Note On State Remedies For Federal Rights, The Federal Courts and the Federal System, 474-77 (1953).

State court jurisdiction of these state and federal remedies may be granted in both state remedial statutes and state statutes of general jurisdiction.

See, e.g., G.L. (Ter. Ed.) c. 212 § 4 (1954). The death statute in the Commonwealth of Massachusetts does not contain a separate grant of jurisdiction, M.G.L.A., c. 229 § 1, et seq. (1967), although death statutes of other states do. See, e.g., *Safir* v. *Compagnie Generale Transatlantique,* supra at 507, which suggests that the Decedent Estate Law of New York, McKenney's Consol. Laws, c. 13, § 130, is the source of state court jurisdiction.

There is little doubt that state courts possess jurisdiction of remedies under the General Maritime Law.

> *Boudreau* v. *Boat Andrea G. Corporation,* supra; *Proctor* v. *Dillon,* supra.

There is no doubt that state courts possess jurisdiction of remedies created under state statutory law.

Similarities existing between the cause of action pleaded under the DOHSA and those extant in the corpus of the General Maritime Law suggest that state and federal court concurrent jurisdiction may also exist in particular instances by virtue of pendent jurisdiction.

Pendent jurisdiction has been held to permit trial by jury of causes of action for unseaworthiness and maintenance and cure if a cause of action under the Jones Act is also alleged. In effect, a civil court is given concurrent jurisdiction with an admiralty court to decide a question under the General Maritime Law.

> *Fitzgerald* v. *United States Lines Company,* 374 U.S. 16; reh. denied 375 U.S. 870 (1963):

It seems anomalous that the rationale compelling the finding of pendent jurisdiction in *Fitzgerald* could fail to compel a finding of pendent jurisdiction in the case at bar. In both *Fitzgerald* and the case at bar, causes of action under the Jones Act were pleaded. In both *Fitzgerald* and the case at bar violation of rights under the General Maritime Law were alleged.

> Cf. *Batkiewicz* v. *Seas Shipping Co.,* supra.

The most recent decision of this Honorable Court relating to wrongful death in admiralty has suggested the existence of concurrent jurisdiction.

"We note that § 1 of the . . . (DOHSA) . . . which authorizes "a suit for damages in the district courts of the United States, in admiralty," has been construed to place exclusive jurisdiction on the admiralty side of the federal courts for suits under the Act, e.g., *Devlin* v. *Flying Tiger Lines, Inc.*, 220 F. Supp. 924 (D.C.S.D.N.Y. 1963), although there was earlier authority to the contrary. *Bugden* v. *Trawler Cambridge,* 319 Mass. 315, 65 N.E. 2d 533 (1946). If we found from the legislative history that Congress imposed exclusive jurisdiction because of a desire to avoid the presentation of wrongful death claims to juries, that might support an inference that Congress meant to forbid nonstatutory maritime actions for wrongful death, which might come before state or federal juries, Cf. *Fitzgerald* v. *United States Lines,* 374 U.S. 16, 83 S. Ct. 1646, 10 L. Ed. 2d 720 (1963). However, that is not the case. The only discussion of exclusive jurisdiction in the legislative history is found in the House floor debates, during the course of which Senator Volstead, floor manager of the bill and chairman of the Judiciary Committee, told the members that exclusive jurisdiction would follow necessarily from the fact that the Act would be part of the federal maritime law. 59 Cong. Rec. 4485. This erroneous view disregards the "saving clause" in 28 U.S.C. § 1333, and the fact that federal maritime law is applicable to suits brought in state courts under the permission of that clause.

Moragne v. *States Marine Lines, Inc.*, supra at 401 fn. 14.

Many authoritative commentators have also concluded that concurrent jurisdiction exists.

See, e.g., American Law Institute, supra at § 1316 and Commentary pp. 34-5, 236-37; Benedict on Admiralty, Vol. 1, § 142, p. 382 (6th Ed. 1940); Forde, supra; Magruder and Grant, Wrongful Death Within the Admiralty Jurisdiction, 35 Yale L.J. 395, 420 (1926); Seminar of Current Developments in Admiralty Law, Sponsored by Illinois State Bar Association and American Trial Lawyers Association.

It has been widely recognized that concurrent jurisdiction is desirable.

See, e.g., American Law Institute, supra at § 1316 and Commentary at pp. 34-35 and 236-37; Forde, supra.

IX.
Conclusion

The issue now presented to this Honorable Court is deserving of resolution. In spite of the fact that the DOHSA has provided a remedy for wrongful death on the high seas since 1920, the precise nature of that remedy is still unknown. Only recently did this Honorable Court cast grave doubt upon the accuracy of the majority rule concerning this issue. There is reason to believe that the majority rule is unsound and deserving of rectification even without reference to recent decisions. It is therefore prayed that a writ of certiorari issue to the Superior Court of the Commonwealth of Massachusetts, County of Suffolk, so that this issue may be resolved.

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On Brief

Appendix A.

DOCKET ENTRY OF JUDGMENT

May 4, 1971. Exceptions overruled.
Rescript May 4, 1971.
Reasons as stated in rescript.

Appendix B.

RESCRIPT

Commonwealth of Massachusetts
Supreme Judicial Court for the Commonwealth
at Boston, May 4, 1971

In the case of

NELLIE POPE, administratrix

v.

MOORE-MCCORMACK LINES, INC.

pending in the Superior Court for the County of Suffolk

Ordered, that the following entry be made in the docket; viz.;

EXCEPTIONS OVERRULED

By the Court,

FREDERICK J. QUINLAN

Clerk

May 4, 1971

Appendix C.

OPINION OF THE COURT

Nellie Pope, administratrix

v.

Moore-McCormack Lines, Inc.

The declaration in this action of tort and contract contains five counts. A demurrer was sustained to count 5, and the other four counts were disposed of after trial by jury. Count 5 was brought under the Death on the High Seas Act, 46 U.S.C. §§ 761 et seq. (1964), and the ground of demurrer was that Federal Courts have exclusive jurisdiction of actions under that act. *Boudreau* v. *Boat Andrea G. Corp.*, 350 Mass. 473, 475-476. We are now asked to oevrrule the *Boudreau* case as inconsistent with a dictum in a footnote in the subsequent opinion in *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 400, n. 14. See Forde, Concurrent Jurisdiction of State and Federal Courts in Actions Under the Federal Death on the High Seas Act, 1969 Trial Lawyer's Guide 27; Am. Law. Inst., Study of the Division of Jurisdiction between State and Federal Courts, § 1316 and Commentary, pp. 34-35, 236-237. We do not think that dictum is sufficiently clear to induce us to overrule the *Boudreau* case. Count 5 does not purport to state a claim under nonstatutory Federal maritime law, even if such a claim could now be tried in a State court. The defendant's claim that the jury verdict on count 2 renders count 5 moot is left for a court having jurisdiction of the claim stated in count 5.

Appendix D.

DEATH ON THE HIGH SEAS ACT

§ 1, 46 U.S.C. § 761 (1964)

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

Appendix E.

JONES ACT

§ 1, 46 U.S.C. § 688 (1964)

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Appendix F.

28 U.S.C. § 1333 (1964)

The district courts shall have original jurisdiction, exclusive of the courts of the States, of any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Appendix G.

28 U.S.C. § 41(3) (1940)

Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it.

Appendix H.

G.L. (Ter. Ed.) c. 212 § 4 (1954)

The court shall have original jurisdiction of all civil actions, except those of which other courts have exclusive original jurisdiction.

Appendix I.

WRONGFUL DEATH ACT

M.G.L.A. c. 229 § 2 (1967)

A person who (1) by his negligence causes the death of a person in the exercise of due care, or (2) by willful, wanton or reckless act causes the death of a person under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, or (3) operates a common carrier of passengers and by his negligence causes the death of a passenger, or (4) operates a common carrier of passengers and by his wilful, wanton or reckless act causes the death of a passenger under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, shall be liable in damages in the sum of not less than five thousand nor more than fifty thousand dollars, to be assessed with reference to the degree of his culpability and distributed as provided in section one . . . a person shall be liable for the negligence or the wilful, wanton or reckless act of his agents or servants while engaged in his business to the same extent and subject to the same limits as he would be liable under this section for his own act, except that the damages shall be assessed with reference to the degree of culpability of his agents or servants. Damages under this section shall be recovered in an action of tort by the executor or administrator of the deceased. No recovery shall be had under this section for death which does not occur within two years after the injury which caused the death. An action to recover damages under this section shall be commenced within two years from the date of death . . . .

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-220

NELLIE POPE, ADMINISTRATRIX,
PETITIONER,

v.

MOORE-McCORMACK LINES, INC.,
RESPONDENT.

SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF MASSACHUSETTS, COUNTY OF SUFFOLK

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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In the
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OCTOBER TERM, 1971

No. 71-220

NELLIE POPE, ADMINISTRATRIX,
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v.

MOORE-McCORMACK LINES, INC.,
RESPONDENT.

SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF MASSACHUSETTS, COUNTY OF SUFFOLK

To the Honorable, the Chief Justice and The Associate Justices of the Supreme Court of the United States:

Petitioner, Nellie Pope, Administratrix of the Estate of Rudolph Campbell, respectfully prays that a Writ of Certiorari issue to the Superior Court of the Commonwealth of Massachusetts, County of Suffolk, to review the judgment of that Court rendered on the 17th day of May, 1971, and entered on the 18th day of August, 1971, pursuant to rescript of the Supreme Judicial Court of the Commonwealth of Massachusetts entered in the Superior Court Docket on the 4th day of May, 1971. A copy of the docket

entry of judgment is appended hereto and marked "Appendix J." This Supplemental Petition is submitted to clarify some misleading and at times inaccurate language appearing in Petitioner's original Petition for Writ of Certiorari concerning dates of judgment and judgment entry.

I

Question Presented

Is the petitioner's Petition for Writ of Certiorari to the Superior Court of Massachusetts, County of Suffolk, timely?

II

Statutes and Rules Involved

The petition involves the following statutes and rules:

28 U.S.C. 2101(c) (1964)
Rule 79 of the Superior Court Rules of the Commonwealth of Massachusetts.

III

Further History of Proceedings

The Supreme Judicial Court of the Commonwealth of Massachusetts held by rescript on the 4th day of May, 1971, that Count V of the Petitioner's Declaration did not state a claim within the jurisdiction of the Courts of the Commonwealth of Massachusetts. [As previously noted in the original Petition For Writ of Certiorari, Count V of the Petitioner's Declaration alleged a cause of action under the Death on the High Seas Act, §§ 1-7, 46 U.S.C. §§ 761-68

(1964).] Entry of that rescript was made in the docket of the Superior Court of the Commonwealth of Massachusetts, County of Suffolk, on the 4th day of May, 1971. By operation of Rule 79 of the aforesaid Superior Court Rules, Count V went to judgment on the 17th day of May, 1971. (See Appendix K for relevant portions of Rule 79). The Petition for Writ of Certiorari in the above-entitled action was docketed in the Supreme Court of the United States on the 12th day of August, 1971. After motion of the petitioner, it was ordered by the aforesaid Superior Court that judgment on Count V be entered in the docket of that Superior Court on the 18th day of August, 1971. (See Appendix J for Supplementary Docket Entry of Judgment.)

IV

Argument

The petitioner's Petition for Writ of Certiorari to the Superior Court of Massachusetts, County of Suffolk, is timely.

Section 2101(c) of Title 28 of the United States Code provides that

> "... any writ of certiorari intended to bring any judgment ... before the Supreme Court for review shall be ... applied for within ninety days after the entry of such judgment...."

The judgment requested to be reviewed was entered on the 18th day of August, 1971, and thus falls within the prescriptive period of Section 2101(c).

Said judgment is, by the same token, ripe for review. Count V of the above-entitled action went to judgment on the 17th day of May, 1971, pursuant to operation of Rule

79 of the Superior Court Rules. The relevant portion of that rule provides that:

> "Judgment in civil actions and proceedings ripe for judgment shall be entered by the clerk, unless the party entitled thereto otherwise requests in writing or the court otherwise orders, at ten o'clock in the forenoon, on Monday of each week. The court may order judgment to be entered at other times. On written agreement of the parties filed with the clerk, judgment may be entered by the clerk on any day, without further order.
>
> An action or proceeding shall not be ripe for judgment until the time for filing exceptions has expired; nor while a case is reserved for report; nor until the time for claiming appeal has expired; nor in case of nonsuit or default; nor in case of notice to the clerk that a party desires to be present at the taxation of costs, until the costs have been taxed and finally determined, unless judgment and execution are awarded under G.L. (Ter.Ed.) c. 261 § 21.
>
> Judgment after rescript for the supreme judicial court shall not be entered by the clerk as of course until the time for entering judgment next following the tenth day after the receipt of the rescript."

The 17th day of May, 1971 was ten days after the Monday succeeding the 4th day of May, 1971.

Entry of Judgment on Count V did not occur on the 17th day of May, 1971, because of the custom and practice of the Clerks' Office of the Superior Court of the Commonwealth of Massachusetts, County of Suffolk. (See Appendix L for Letter of Clerk of Supreme Judicial Court of the Commonwealth of Massachusetts.)

V.

Conclusion

The petitioner's Petition for Writ of Certiorari to the Superior Court of Massachusetts, County of Suffolk, is timely. The petition clearly falls within the relevant prescriptive periods of state and federal law. Said petition should be considered on its merits as deserving of review.

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Appendix J

SUPPLEMENTARY DOCKET ENTRY OF JUDGMENT
Superior Court for Civil Business

Date	*No.*	*Entered*
May 4, 1971	31	Rescript from S.J.C. Order; Exceptions overruled; No. sent.
August 18, 1971	32	Motion of Plaintiff for entry of judgment for defendant on Counts I, II, III and V, allowed by consent. No. sent 8/18/71.
August 18, 1971	—	By consent and by Order of Court, Judgment entered for defendant as to Counts I, II, III and V. (Per T.F.B.)

Appendix K

RULE 79 OF THE SUPERIOR COURT RULES (RELEVANT PORTIONS)

Entry of Judgment.

Judgment in civil actions and proceedings ripe for judgment shall be entered by the clerk, unless the party entitled thereto otherwise requests in writing or the court otherwise orders, at ten o'clock in the forenoon, on Monday of each week. The court may order judgment to be entered at other times. On written agreement of the parties filed with the clerk, judgment may be entered by the clerk on any day, without further order.

An action or proceeding shall not be ripe for judgment until the time for filing exceptions has expired; nor while a case is reserved for report; nor until the time for claiming appeal has expired; nor in case of nonsuit or default until after the expiration of four days from such nonsuit or default; nor in case of notice to the clerk that a party desires to be present at the taxation of costs, until the costs have been taxed and finally determined, unless judgment and execution are awarded under G.L. (Ter.Ed.) c. 261 §21.

Judgment after rescript for the supreme judicial court shall not be entered by the clerk as of course until the time for entering judgment next following the tenth day after the receipt of the rescript.

Appendix L

LETTER OF CLERK OF SUPREME JUDICIAL COURT

August 19, 1971

Re: NELLIE POPE, ADMINISTRATRIX,
PETITIONER,
v.
MOORE-McCORMACK LINES, INC.,
RESPONDENT.

To the Honorable Supreme Court of the United States:

The above-entitled action went to final judgment in the Superior Court of the Commonwealth of Massachusetts, County of Suffolk, on the 17th day of May, 1971.

On the 4th day of May, 1971, the Supreme Judicial Court of the Commonwealth of Massachusetts overruled the Bill of Exceptions of the Petitioner, Nellie Pope, by rescript. The rescript was then sent to the Superior Court of the Commonwealth of Massachusetts, County of Suffolk, for entry on its docket. Subsequent to entry of the rescript and prior to judgment, Petitioner and Respondent had an opportunity to make appropriate motions. Judgment occurred by operation of Rule 79 of the Superior Court Rules on the 17th day of May, 1971. Judgment was not actually entered on the docket at that date in accordance with the local practice of not docketing judgments. Judgment was entered on the Superior Court docket on the 18th day of August, 1971.

Judgment is necessary in the Superior Court of the Commonwealth of Massachusetts to finally terminate proceedings. This requirement arises out of the circumstance that the Supreme Judicial Court of the Commonwealth of Massachusetts is not a court of record. When a Bill of Exceptions is presented to the Supreme Judicial Court, the case itself remains with the Superior Court from which the exceptions are taken. The Order of the Supreme Judicial

Court treating the Bill of Exceptions is limited in scope and is only addressed to restricted issues of law. Disposition of the case is at the Superior Court level and only occurs through operation of Superior Court Rules or Superior Court action.

Very truly yours,

Appendix M

28 U.S.C. § 2101(c) (1964)

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree.

SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
SEP 11 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-220

NELLIE POPE, ADMINISTRATRIX,
PETITIONER,

v.

MOORE-McCORMACK LINES, INC.,
RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the
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NELLIE POPE, ADMINISTRATRIX,
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v.

MOORE-McCORMACK LINES, INC.,
RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

Statement of the Case

The Plaintiff, a married sister of the decedent, filed the action on behalf of herself and his other married sisters, claiming dependency on the decedent who was not married. The place of death was at sea.

There were no other claimants and all claimants were within the same class both under the Jones Act and under the Death on the High Seas Act. The case was tried to a

jury in the Massachusetts Superior Court with verdicts for the Defendant as follows:

Count I (Jones Act) alleged the Defendant was negligent and claimed damages from the Defendant because of the personal injury sustained by the decedent as a result of that negligence of the Defendant. The jury found for the Defendant on Count I for negligence under the Jones Act.

Count II (Unseaworthiness) alleged that the Defendant's vessel was unseaworthy and claimed damages from the Defendant on the ground that the alleged unseaworthiness of the Defendant's vessel caused personal injury to the decedent. The jury found for the Defendant on Count II, the unseaworthiness count.

Count III (Jones Act) alleged a cause of action for death under the Jones Act, more particularly, that the Defendant was negligent and claimed damages on the ground that alleged negligence caused the death of the decedent and the claimants to sustain pecuniary loss. The jury found for the Defendant on Count III for death under the Jones Act.

Count IV claimed damages for burial expenses and by agreement of the parties was decided by the Court without submission to the jury. It was agreed by the parties that the Shipowner's Liability Convention was applicable.

In Count V (Death on the High Seas Act) the Plaintiff alleged that the death of the decedent was caused by the negligence of the Defendant (as in Counts I and III) and/or by the unseaworthiness of its vessel (as in Count II). The claim was loss of dependency for the married sisters from the unmarried decedent (as in Count III). This Count was expressly pleaded under the Death on the High Seas Act. The Court granted a demurrer to Count V upon the ground that it was improperly brought as a matter of law in the State Court of Massachusetts.

II

Argument

I. The Issues Presented by the Petition Are Moot as a Result of the Jury's Verdict.

The same issues of negligence and unseaworthiness which the Petitioner alleged in Count V were fully tried to the jury at the trial under Counts I, II and III. Count I and Count III were based upon negligence of the Defendant and the jury found for the Defendant. Count II was based upon unseaworthiness of the Defendant's vessel and the jury found for the Defendant. Count V was a repetitive count for it repeated the same gravamen of negligence and unseaworthiness as Counts I, II and III. Since the proof of negligence and/or unseaworthiness required for Counts I, II and IIII was a sine qua non of Count V, the jury's verdict for the Defendant on the issues of negligence and unseaworthiness not only renders the present appeal moot, but subjects Count V to the additional defense of res judicata. It would merely raise the same basic right, facts, and matters already in issue and adjudicated between the same parties.

Viles v. *Prudential*, 124 F.2d 78 (CCA 10, 1941), Cert. Denied 315 U.S. 816

In Re Constructors of Fla., Inc., 349 F.2d 595, (CCA 5, 1965) Cert. Denied 383 U.S. 912

II. No Federal Question of Substance is Presented by the Petition.

A. By the plain words in the opening section, Section 1, reading:

> ". . . the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty",

it is inescapable that the Death on the High Seas Act creates a cause of action,

> "in the district courts of the United States, in admiralty".
> *Death on the High Seas Act*, §§1-7, 46 U.S.C. §§ 761-68 (1964)

That language clearly does not create a cause of action in the State Court. The obviousness of that conclusion is heightened by the following:

(1) The language appears in the opening clause of the statute which is the only enactment clause in the entire statute. All sections which follow with the possible exception of Section 2 are adjective in purpose, nature and position.

(2) The opening clause is the classical position for the enactment language.

(3) The statute modifies the common law. Unless a cause of action is created expressly by its terms it is not created. It is therefore not enough to contend that the statute does not negate an alleged inference of State Court jurisdiction; it must create it expressly by positive declaration—as it does not; and therefore such jurisdiction does not exist under the statute.

B. Petitioner's efforts to elevate §7 to a position of enactment are both contrary to its own terms and contrary to its position. Thus §7 is entitled, "Exceptions from operation of chapter". From that apt description its purpose and effect are not one of positive grant or enactment, but of negation. Its operating words are, "shall not be affected

by this chapter". It neither creates nor confers jurisdiction. Such application as it has is limited to "any State statute giving or regulating rights or remedies for death". There is no State statute pleaded in the present case and §7 is necessarily unrelated to this case. We note §7 is not included in the Petition's Appendix. Nor does §7 refer to procedure for it uses two terms of art, "right of action or remedies"; the first of these speaks in terms of substance when used with the second, and the second speaks in terms of procedure when used with the first. It therefore affects both. The Section's purpose was one of tolerance of State statutes but not creation of State Court jurisdiction. Thus, at Page 398 of the *Moragne* decision, the United States Supreme Court states:

> "The express provision that state remedies in territorial waters were not disturbed by the Act ensured that Congress' solution of one problem would not create another by inviting the courts to find that the Act pre-empted the entire field, destroying the state remedies that had previously existed."
>
> *Moragne* v. *States Marine Lines, Inc.*, 26 L. Ed. 2d 339, 90 S. Ct.

Plainly, therefore, the purpose of §7 was to preserve rather than to create. The creating function of the Statute was complete in §1, the enactment clause. The United States Supreme Court stated at Page 398 of the *Moragne* opinion that Section 7 referred to, "the state remedies that were left undisturbed". It is idle therefore to seek to torture Section 7 into an enacting clause by Congress which would create jurisdiction for a cause of action under this same Death on the High Seas Act in a State court.

III. The State Court of Massachusetts Has Not Decided a Federal Question of Substance, But Has Merely Followed the Already Clear and Universal Authorities in the Federal Courts.

A. The universality of the Federal authorities is demonstrated by the following breadth of cases holding in accord with the decision of the Supreme Court of Massachusetts.

First Circuit —	*Turner* v. *Wilson Line*, 242 F.2d 414, (CA 1st Cir. 1957)
Second Circuit —	*Noel* v. *Linea Aeropostal Venezolana*, 247 F.2d 677 (2nd Cir. 1957) Cert. Denied 355 U.S. 907, 1957
	Middleton v. *Luckenbach S.S. Co.*, 70 F.2d 326 (1934)
	D'Aleman v. *Pan American World Airways*, 259 F.2d 493 (1958)
	First Nat. Bank of Greenwich v. *National Airlines, Inc.*, 288 F.2d 621 (1961)
Third Circuit —	*Blumenthal* v. *United States*, 306 F.2d 16 (3rd Cir. 1962)
Fifth Circuit —	*Dore* v. *Link Belt Company*, 391 F.2d 671 (1968)
Ninth Circuit —	*Trihey* v. *Transocean Air Lines*, 255 F.2d 824 (1958)
	Higa v. *Transocean Air Lines*, 230 F.2d 785 (1955)
	Berry v. *Pacific Sportfishing, Inc.*, 372 F.2d 213 (1967)

Against the foregoing breadth of authority the Petitioner would seek to rely on what has been characterized by the

United States District Court for the Southern District of New York as "discredited".

> *Canillas* v. *Joseph H. Carter, Inc.*, 280 F. Supp. 48, 51 (S.D. N.Y. 1968)

Those earlier "discredited" authorities consisted of lower court cases in the State of New York and a single Appellate Court case, i.e., *Ledet* v. *United States Aircraft Corporation,* 10 N.Y. 2d. 258. It is especially significant that the characterization, "discredited in this district", was that of the United States District Court for the Southern District of New York.

B. The State of Massachusetts has solidly put at rest any possibility of a contrary view in that State. In *Boudreau* v. *Boat Andrea G. Corporation,* 250 Mass. 473, the Massachusetts Supreme Court dismissed earlier authorities on which the Petitioner would now rely, stating at Pages 475 and 476 as follows:

> "It was intimated but not decided in *Bugden* v. *Trawler Cambridge, Inc.,* 319 Mass. 315, 318, on which the plaintiff relies, that there may likewise be concurrent jurisdiction in State and Federal courts of actions under the Death on the High Seas Act. See *Choy* v. *Pan-American Airways Co.,* 1941 A.M.C. 483 (S.D. N.Y.); *Ledet* v. *United Aircraft Corp.,* 10 N.Y. 2d 258, 261. The prevailing opinion is now to the contrary, holding that exclusive jurisdiction under 46 U.S.C. § 761 (1958) is in the Federal court. *Higa* v. *Transocean Airlines,* 230 F. 2d 780 (9th Cir.); *Wilson* v. *Transocean Airlines,* 121 F. Supp. 85 (N.D. Cal.); *Devlin* v. *Flying Tiger Lines, Inc.,* 220 F. Supp. 924, 928 (S.D.N.Y.); *Jennings* v. *Goodyear Aircraft Corp.,* 227 F. Supp. 246 (D. Del.); *Gordon* v. *Reynolds,* 187

Cal. App. 2d 472, 477-478. See Chief Judge Desmond's dissent in *Ledet* v. *United Aircraft Corp.*, 10 N.Y. 2d 258, 261-263. See also Edelman, 1 Maritime Injury and Death, 139 and Norris, Law of Seamen, 773. Com. pare Magruder and Grout, Wrongful Death within the Admiralty Jurisdiction, 35 Yale L. J. 395, 420 with, Day, Maritime Wrongful Death and Survival Recovery: the Need for Legislative Reform, 64 Col. L. Rev. 648, 653-654 (fn. 15), 682; Note, 47 Cornell L.Q. 632, 634-636. See also Currie, The Silver Oar and All That: A Study of the Romero Case, 27 U. Chicago L. Rev. 1, 36-38. Although the point has not been definitely decided by the United States Supreme Court, the dictum in *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 369, 371, fns. 25 and 28, indicates that the court is in accord with the view that there is exclusive jurisdiction in the Federal courts under the Death on the High Seas Act. Since the latter act is not part of the general maritime law a cause of action under it may not be joined in a State court with a cause of action under the Jones Act as may be a cause of action under general maritime law for personal injury caused by unseaworthiness. See *Fitzgerald* v. *United States Lines Co.*, 374 U.S. 16, 21; *Bono* v. *Ocean Wave, Inc.*, ante, 470, 472. It follows that the second count here which rests on the Death on the High Seas Act should be dismissed for want of jurisdiction."

C. Two recent expressions by the United States Supreme Court are also in accord. In 1959 in the case of *Romero* v. *International Terminal Operators,* (358 U.S. 354) the Court made the following comment at Page 371:

"Congress has not once left the availability of a trial on the law side to inference. It has made specific provisions."

Footnote 28 was appended to that sentence reading:

> "28. Such provisions are in the Jones Act, 41 State 1007 (1920), 46 USC §688 and in the Great Lakes Act, 5 Stat 726 (1845), 28 USC §873. Neither the Suits in Admiralty Act of 1920, 41 Stat 525, 46 USC §§741-752, nor the Death on the High Seas Act, 41 Stat 537 (1920), 46 USC §§761-767, allows a jury trial in personal injury cases. When the Death on the High Seas Act was being debated it was stated that 'That question was thrashed out and it was decided best not to incorporate into this bill a jury trial because of the difficulties in admiralty proceedings.' Congressman Igoe, speaking for the Judiciary Committee, 59 Cong Rec 4482, 60th Cong, 2d Sess (1920)."

It is of interest that the first sentence of Congressman Igoe's statement quoted in both *Higa* and *Dore* supra, reads:

> "Mr. Igoe. Does not the gentleman think that he should inform the gentleman from Ohio (Mr. Ricketts) that *this proceeding will be in admiralty and that there will be no jury,* so that no Member of the House may have any misunderstanding about it? That question was thrashed out and it was decided best not to incorporate into this bill a jury trial because of the difficulties in admiralty proceedings." (Page 4482. Emphasis added.)
>
> "Mr. Moore of Virginia. * * * The purpose of this bill, as I understand it, is to give exclusive jurisdiction to the admiralty courts where the accident occurs on the high seas.
>
> "Mr. Volstead. That is it." (Page 4483.) Congressional Record, Volume 59, Part V.

In Footnote 25 of *Romero* the Court provided a specific comment material to the present issue:

> "25. Of course, in a few instances, Congress has provided the federal admiralty courts with a specific statutory jurisdiction. E.g., Death on the High Seas Act, 41 Stat 537 (1920), 46 USC §§761-767."

The Congressional Record also confirms that the reason for Section 7 was to preserve for those states which had already or might wish to legislate in respect to the high seas, could be free to do so. Illinois was specially cited as an illustration. Massachusetts has no extra territorial State Death Statute.

The Sagamore, 247 F. 743 (CCA NY 1918)

The same Congressional Record contains illuminating comments by Mr. Mann, the member who offered the successful amendment to §7. He described the effect of his amendment:

> "That is the way it will be left so the act will not take away any jurisdiction conferred now by the States."

Section 7 did not confer any new jurisdiction on the States. As Mr. Mann stated, Section 7 merely left unaffected those State statutes referred to expressly in its terms.

The second authoritative source from the U. S. Supreme Court was in the recent landmark decision in 1970, *Moragne* v. *States Marine Lines,* 398 U.S. 375. Therein, the Court referred frequently to the Death on the High Seas Act as a useful source of legislative policy. In the *Moragne* case,

the death of the decedent had occurred within the territorial water of Florida. In Footnote 14 on Page 400, the Court at first comments concerning the exclusive jurisdiction in the Federal Courts of the Death on the High Seas Act:

> "14. We note that §1 of the Act, which authorizes 'a suit for damages in the district courts of the United States, in admiralty,' has been construed to place exclusive jurisdiction on the admiralty side of the federal courts for suits under the Act, e.g., Delvin v. Flying Tiger Lines, Inc., 220 F. Supp. 924 (D.C.S.D.N.Y. 1963) although there was earlier authority to the contrary. Bugden v. Trawler Cambridge, 319 Mass. 315, 65 N.E.2d 533 (1946) . . ."

While it is plain that the Court did not thereby purport to make a determination or adjudication concerning the exclusivity of Federal Court jurisdiction, it is equally plain that the Court did not hesitate upon the existence of exclusive jurisdiction but advanced to determine the reasons why "Congress imposed exclusive jurisdiction".

Footnote 14 continued as follows:

> "If we found from the legislative history that Congress imposed exclusive jurisdiction because of a desire to avoid the presentation of wrongful-death claims to juries, that might support an inference that Congress meant to forbid nonstatutory maritime actions for wrongful death, which might come before state or federal juries. Cf. Fitzgerald v. United States Lines, 374 U.S. 16 (1963). However, that is not the case. The only discussion of exclusive jurisdiction in the legislative history is found in the House floor debates, dur-

ing the course of which Representative Volstead, floor manager of the bill and chairman of the Judiciary Committee, told the members that exclusive jurisdiction would follow necessarily from the fact that the Act would be part of the federal maritime law. 59 Cong. Rec. 4485. This erroneous* view disregards the 'saving clause' in 28 U.S.C. §1333, and the fact that federal maritime law is applicable to suits brought in state courts under the permission of that clause. See n. 1, supra. When asked whether it was true that jury trials would never be available in suits under the Act, Representative Volstead replied: 'I do not think so. Perhaps for certain purposes, under the practice that prevails, they may have a jury, but ordinarily a jury is not allowed. However, I do not know much about admiralty practice.' 59 Cong. Rec. 4485. From this we can derive no expression of policy bearing on the matter under discussion.''

The Court was unable to draw any expression of policy from the discussion in the legislative history respecting the reason for exclusive jurisdiction, but no question was raised in the footnote concerning the existence of exclusive jurisdiction, only concerning the reason for its existence.

The Massachusetts Court, therefore, adopted the universal weight of authority and has in no sense purported to decide a Federal question of substance.

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* If his views are those at page 4485 reading: ". . . the power to pass laws on this subject is conferred on Congress in the Constitution and wherever Congress acts I have no doubt it excludes the power on the part of the States to pass laws on the subject," and if he was referring to legislation in the States rather than litigation as under the Savings Clause (28 USC 1333), some defense of Mr. Volstead might be possible.

IV. No Jurisdictional Void Exists.

The area of concern in the *Moragne* case was the void in jurisdiction which denied to the plaintiff a remedy for unseaworthiness. That void was caused by the decision of the Supreme Court of the State of Florida limiting the State Death Statute of Florida to actions for negligence only and not for unseaworthiness. Since the death of the decedent had occurred within the territorial waters of Florida, a remedy under the Death on the High Seas Act was not available to the Petitioner and the void occurred.

Here, however, there was no jurisdictional void for the Petitioner had a remedy under the Death on the High Seas Act. It was clear from well-established authorities that remedy was available to the Petitioner in the Federal Court.

The Petitioner elected not to bring the action in the United States District Court for the District of Massachusetts. There jurisdiction of all five counts was plainly available. Trial of the jury Counts I, II and III concurrently with the Admiralty Count by the Court would have been a simple procedure. The Petitioner's decision to bring the action in the State Court was an intentional and needless election. Nor was it in any respect an oversight for counsel for the present Petitioner was also counsel for the Appellant in *Boudreau* v. *Boat Andrea G. Corporation,* 350 Mass. 473.

The filing of this Petition, therefore, results from the option of the Petitioner and not from any jurisdictional void as confronted the plaintiff in *Moragne.*

V. Any Issue Presented Is a State Issue, Not a Federal Issue.

Although the Massachusetts Supreme Court respected and followed the universal weight of Federal authority, the issue would in any event be a State issue only. If the Death on the High Seas Act be not regarded as pre-empting the State right to create a cause of action in this area, the decision whether to or not to exercise that right would be that of the State under such considerations. By its plain terms the only effect of §7 is permissive and not mandatory. In that event, the same legislative policy which was acknowledged at the Federal level in the *Moragne* decision would become a proper source of guidance at the State legislative level. Massachusetts does not grant an extra territorial cause of action for death under its statute.

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The Massachusetts Statute uses the phrase, "degree of culpability," and is customarily referred to as a "punitive statute". In that event, Massachusetts would be extending a punitive action to conduct which occurred outside its territorial waters. For Congress to be put in the position of visiting upon the Massachusetts Courts and Massachusetts Legislature a cause of action foreign in nature to those historically adhered to in Massachusetts would be illogical under the language of Section 1 and in complete conflict with Section 7 and especially in conflict with the strong concern of Congress manifest in the Congressional Record toward both the exclusivity of the Federal jurisdiction and the safeguarding of the State's jurisdictional interests. It would clearly be adverse to the legislative policy of Congress which assures the respective States that State Statutes "shall not be affected by this

Chapter" to have this Chapter used as an instrumentality to thrust upon the States an obligation to grant an extra-territorial cause of action for death, foreign both to their own physical jurisdiction and to their own statutory history, simply because this particular petitioner elected not to use the United States District Court in Boston only five blocks away from the Superior Court. In the case of Massachusetts' punitive death statutes, the State statute would be "affected" in a major manner whether it be pre-empted or whether it be the subject of a grafting on of another cause of action as the Petitioner contends.

> *The Tungus* v. *Skovgaard,* 358 U.S. 588, 3 L. Ed. 2d 524, 79 S. Ct. 503 at page 529:
> "The record of the debate in the House of Representatives preceding passage of the bill reflects deep concern that the power of the States to create actions for wrongful death in no way be affected by enactment of the federal law. 59 Cong. Rec. 4482-4486."

Accordingly, it would be completely opposite to the text of §1 of the Statute to grant the Petition and equally opposite to the provisions of §7.

The Petitioner enters areas of speculation unsupported by any specific authorities, and some of its authorities appear to offer support for the opposite conclusion. Thus in *Testa* v. *Katt,* 330 U.S. 386 (1947) cited at Page 11 of the Petition, Congress provided express language (cf. Footnote 2, Page 388 of that Opinion) that State courts should have civil jurisdiction for recovery of overcharges under §205 of the OPA Statute. The language of the Statute read:

> "The district courts shall have jurisdiction of criminal proceedings . . . and concurrently with State and Terri-

torial courts of all other proceedings under §205 of this Act . . .''

That simple specificity was plainly and therefore intentionally absent from the Death on the High Seas Act. In the case of *Galveston H. & S. A. Ry. Co.* v. *Wallace*, 223 U.S. 481 (1912) excerpted from at Page 11 of the Petition, the Federal Statute there provided:

> ''. . . that persons damaged by a *violation* of the statute 'might make complaint before the commission . . . or in any District or Circuit Court of the United States.' ''

In reviewing an action commenced in the State Court, the United States Supreme Court ruled in its opinion that the plaintiff's damage was not within the Statute and therefore not subject to the exclusivity of Federal Court jurisdiction in the quoted statutory language. The Court stated at Page 490 that the plaintiff's damage was, ''in no way traceable to a violation of the statute, and is not therefore within the provisions of §8 and §9 of the act . . .''. The Court plainly construed the language of the Act of Congress to create exclusive Federal jurisdiction. The language which was held to create exclusive Federal Court jurisdiction in that Statute is similar, if not identical, to that of §1 of the Death on the High Seas Act. The latter reads, ''. . . may maintain a suit for damages in the district courts of the United States in admiralty''. In describing the effect of the Statute in the *Galveston* case, the Court stated at Page 490, (in a sentence which immediately preceded the excerpt in the Petition):

> ''Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will

be left to the remedy given by the statute which created the right."

That reference to an exclusive remedy referred to §8 and §9 of the Statute whose language is plainly similar to that of the Death on the High Seas Act.

VI. Any Other Cause of Action Than That Alleged Under the Death on the High Seas Act Is Not Pleaded and Is Not in Issue.

The concluding sentence of Count V of the Declaration which is the subject of the Petition reads:

"That the plaintiff elects to bring this cause of action under the Death on the High Seas by Wrongful Act, United States Code, Title 46, §761 et seq."

The Petition itself at Page 3 under the caption, "Question Presented", states:

"...does the state court possess jurisdiction of a cause of action for wrongful death pleaded under the Death on the High Seas Act, §1-7, 46 U.S.C. §761-68 (1964)."

The Massachusetts Supreme Court noted the same point in its rescript opinion when it stated, "Count V does not purport to state a claim under non-statutory Federal maritime law...". There is no support for abstract terms such as "remedy borrowing" in the plain direct language of the Death on the High Seas Act under which Count V of the Declaration was jurisdictionally declared. No Court at any level has applied such theory to this Statute in its fifty year history. The immateriality as well as the implausi-

bility of the Petitioner's contentions are inherently demonstrated by the absence of any such authorities but even more directly by the clarity of language in the statute itself and the frankness of discussion in its legislative colloquy. 59 Congressional Record, 4482-4487.

The Respondent therefore respectfully submits that the Petition should be denied on the grounds that the issues contained therein are moot, that the State Court has not decided any Federal question of substance but has followed the universal and well-established Federal Authorities, and that the Petition is opposite to the text of the Death on the High Seas Act, particularly §1 and §7 thereof. The contention of the Petitioner that relief to the Federal Courts would be granted by visiting the litigation onto the State Courts fails to recognize the congestion which apparently exists more seriously in the State Courts.

III

Conclusion

The decision of the Massachusetts Supreme Court followed the universal and undeviating weight of Federal authority affirmed in five circuits by ten cases, all within the past fifteen years, with no Circuit Court or District Court of the United States supporting the Petitioners. The factual issues of this particular case have already been tried to a jury, and the jury's verdict has been recorded in favor of the Defendant-Respondent. The Respondent respectfully submits that the Petition should be denied.

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